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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 601

ELIZABETH C. LOWNSBURY, ET AL, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION AND THE
COMMONWEALTH & SOUTHERN CORPORATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT*

**BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION
IN OPPOSITION TO PETITION AND IN OPPOSITION
TO MOTION TO DEFER**

OPINIONS BELOW

The majority opinion (R. 66) and concurring opinion (R. 70) in the Circuit Court of Appeals have not been reported. Similarly the opinions of the Commission have not yet been reported. The Commission's findings and opinion of May 31, 1945, have been published as Holding Company Act Release No. 5825. The Commission's

supplemental findings of June 30, 1945, and its order of the same date, have been published as Holding Company Act Release No. 5895. The Commission's order of July 18, 1945, denying petitions for rehearing, for leave to present further evidence, and for a stay, has been published as Holding Company Act Release No. 5942. An order of the Commission dated August 2, 1945, amending the findings and opinion of May 31, 1945, has been published as Holding Company Act Release No. 5966. Copies of all Holding Company Act releases referred to in this brief are being filed with the Clerk of the Court.

JURISDICTION

The Circuit Court of Appeals granted respondent's motion for dismissal of the petition for review on September 11, 1945 (R. 66-76). A petition for rehearing was denied October 2, 1945 (R. 87). In accordance with the practice of the court below no mandate of dismissal has been entered pending the disposition of the petition for a writ of certiorari. The petition for a writ of certiorari was filed November 13, 1945. The jurisdiction of this Court is invoked by petitioner under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-835, 15 U. S. C. § 79 x (a)), and Section 240 (a) of the Judicial Code, as amended (28 U. S. C. § 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79, hereinafter referred to as "the Act"). Sections 11 (d), 11 (e), 18 (f) and 24 (a) thereof (15 U. S. C. §§ 79 k (d), 79 k (e), 79 r (f) and 79 x (a)) are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

1. Where the Securities and Exchange Commission has made an order under Section 11 (e) of the Act approving a reorganization plan, which is not to be consummated unless and until approved and enforced by an appropriate district court, may an objecting stockholder challenge the plan by a petition to review the Commission's order in a circuit court of appeals, or is he limited to the district court enforcement proceedings and to an appeal from any adverse order therein?
2. Whether consideration of the petition for a writ of certiorari should be deferred.

STATEMENT

Section 11 (e) of the Act provides that a company subject to the Commission's jurisdiction may submit a voluntary plan for compliance with the integration and simplification features of the Act, and that thereafter the Commission, if it finds such plan to be fair and equitable and necessary to effectuate the provisions of Section 11 (b), may apply to a United States District Court, if the

company so requests, for an order enforcing the plan. Further provision is made for a court hearing on the fairness and appropriateness of the plan. Such a plan was filed with the Commission under Section 11 (e) by The Commonwealth & Southern Corporation (hereinafter referred to as "Commonwealth").¹ After a number of amendments had been made this plan was approved by the Commission in an order dated June 30, 1945.² This is the principal administrative order complained of by the petition for review, the other being an order of July 18, 1945, denying petitions for rehearing, for leave to present further evidence, and for a stay.³

¹ Previously, on August 9, 1942, the Commission had ordered Commonwealth, under Section 11 (b) (2), to change its capital structure to a single class of common stock in a manner not inconsistent with the Act and the rules of the Commission thereunder. The order was affirmed by the Circuit Court of Appeals for the Third Circuit in *The Commonwealth & Southern Corporation v. Securities and Exchange Commission*, 134 F. 2d 747. The reorganization plan here involved was proposed as a plan to achieve compliance with this earlier order.

² On May 31, 1945, the Commission entered its findings and opinion approving the plan on condition that certain amendments be filed. *The Commonwealth & Southern Corporation*, — S. E. C. —, Holding Company Act Release No. 5825. These amendments having been filed, they were approved by the Commission in a supplemental opinion which accompanied the order of June 30, 1945. *The Commonwealth & Southern Corporation*, — S. E. C. —, Holding Company Act Release No. 5895.

³ *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 5942.

In brief the plan provided as follows:

The presently outstanding securities of Commonwealth, consisting of preferred stock, common stock, and option warrants, were to be replaced by a new class of common stock. The option warrants were to be cancelled as having no value. The new shares of common stock, together with certain portfolio securities of Commonwealth, were to be distributed among the stockholders of Commonwealth in the proportion of 85% to the present preferred stockholders as a class and 15% to the present common stockholders as a class; in addition certain cash payments were to be made to the present preferred stockholders. The plan was conditioned upon receipt of the favorable vote, cast in person or by proxy at a special stockholders' meeting, of a majority of the shares of each class of stock voted at such meeting. The plan provided that, in the event of a favorable vote by the stockholders, Commonwealth would request the Commission to apply to an appropriate district court for approval and enforcement of the plan under Section 11 (e), and that it should not be effective unless approved by a district court.

In accordance with these specific provisions of the plan, the order of the Commission approving the plan provided "that this order shall not be operative to authorize any issuance, transfer or acquisition of securities or distribution of cash

contemplated by said plan, nor the consummation of said plan in any respect, until an appropriate District Court of the United States shall have entered an order enforcing said plan pursuant to an application duly made by the Commission for that purpose." It was also provided in the order that the Commission reserved jurisdiction, in the event of failure of the stockholders to approve the plan by the requisite vote, to take such further proceedings and enter such orders as might be necessary under applicable provisions of the Act.⁴

On August 8, 1945, petitioners filed their petition for review with the Circuit Court of Appeals for the Third Circuit and simultaneously therewith they requested a stay of all proceedings which might be taken to consummate the plan.

Petitioners are minority stockholders who own common stock and option warrants of Commonwealth. During the administrative proceeding they urged a greater participation for the common stock, and that is the principal burden of their petition for review.

The Commission opposed the stay and moved for dismissal of the petition for review on the ground that the Circuit Court of Appeals was not the appropriate forum for review of the Commission's order approving the plan, the proper forum being a United States district court

⁴ *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 5895, p. 6.

when and if proceedings might be instituted for enforcement of the plan. The opinion of the court below denying the stay and granting the motion for dismissal was filed on September 11, 1945 (R. 66).

A stockholders' vote has never been taken with respect to the plan, and an enforcement proceeding has not yet been instituted in a district court. The transcript of the administrative proceeding has not been filed with the Circuit Court of Appeals or with any other court.

Events subsequent to the decision below have materially changed the situation that existed when the petition for review was filed and dismissed by the court below, and as a result petitioners have filed a motion that consideration of the petition for a writ of certiorari be deferred pending further administrative developments. The subsequent events are these:

The Commission's order of June 30, 1945, approving the reorganization plan, had reserved jurisdiction in the Commission to entertain such further proceedings, to make such supplemental findings, and to take such further action as it might deem appropriate in connection with the plan and the consummation thereof.⁵ In accordance with such reservation of jurisdiction, and subsequent to the decision below, a hearing was

⁵ *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 5895, p. 6.

held, on due notice, to determine whether the provision for a vote of the stockholders should be eliminated from the plan. On November 1, 1945, the Commission issued its findings and opinion in which it concluded that the voting provisions should be deleted because (1) a stockholders' vote was not necessary as a matter of law and (2) the inability of the various interested parties to agree on a voting procedure had resulted in excessive delay in the consummation of the plan and gave promise of endless delay in the future. Simultaneously therewith the Commission issued an order providing as follows:

It is so ordered that the order of the Commission of June 30, 1945 be amended so as to provide that the plan of recapitalization of The Commonwealth & Southern Corporation as amended June 14, 1945 be and it is hereby approved pursuant to Section 11 (e) of the Act, on condition however that said plan be amended by The Commonwealth & Southern Corporation within fifteen days of the date hereof so as to eliminate the said provision that a vote of stockholders be held on the said plan; the said order of June 30, 1945 to be, in all other respects, unchanged and unmodified.*

* *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 6177. The staff had asked that, in the alternative, the Commission itself so modify the plan, pursuant to powers vested in it by Section 11 (d), which

On November 13, 1945, Commonwealth submitted to the Commission a document entitled "Respondent's modifications of amended plan submitted under Section 11 (e) of the Act and application for approval."⁷ In this document Commonwealth proposed that the plan be modified to delete the voting provision, but made this proposal contingent upon the acceptance by the Commission of certain other proposed modifications. We agree with petitioners that these additional modifications involve "basic changes in the plan of reorganization" (Motion to Defer, p. 3).

Under the plan approved by the Commission there would be an immediate distribution of certain securities on the basis of 85% to the preferred stockholders of Commonwealth and 15% to the common stockholders of Commonwealth. The additional modifications filed by Commonwealth provide in substance for a trust arrangement provides for district court enforcement of a Commission-sponsored plan.

On the same day, November 1, 1945, the Commission also issued an order dismissing "as moot" certain applications previously filed by Commonwealth and other interested parties (including petitioners) with respect to the solicitation of proxies in connection with the stockholders' vote contemplated by the original plan. *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 6182.

For the discussion in the original opinion approving the stockholders' vote provision, see pp. 48-50 of Holding Company Act Release No. 5825.

⁷ Copies of this document are also being filed with the Clerk.

ment which would give the common stockholders the privilege of waiting up to five years and benefiting from a possible rise in the market value of the securities by acquiring the shares otherwise allocated to the preferred stockholders, through payment of the fixed redemption price for which provision is made in the preferred stock contract. The Commission has not yet acted upon the modifications filed by Commonwealth.

Petitioners' motion urges this Court to defer action on the petition for a writ of certiorari, so that when the Commission has taken final action in the matter they may amend their petition for review in the court below, seek rehearing in that court, and then supplement the record in this Court to conform with the then existing state of facts.

The Commission opposes the granting of this motion and urges immediate disposition of the petition for a writ of certiorari, whether by denial of the writ, or by remand to the court below with instructions to dismiss the petition for review on the ground of mootness.

ARGUMENT

The decision below is squarely in accord with *Okin v. Securities and Exchange Commission*, 145 F. 2d 206 (C. C. A. 2), in which this Court denied certiorari (insofar as concerns the question here presented) on June 18, 1945, *Okin v.*


Securities and Exchange Commission, No. 1245, October Term, 1944. Indeed, the majority opinion below rests upon the opinion of the Circuit Court of Appeals for the Second Circuit in that case.⁶ The decision below is also in accord with decisions by this Court and by the Circuit Court of Appeals for the Seventh Circuit, construing substantially similar statutory provisions. There is no conflict among the circuit courts of appeals. These circumstances, which are discussed more fully at pp. 12-18, *infra*, clearly warrant denial of the petition for a writ of certiorari.

The prematurity of the petition for review and the inappropriateness of petitioners' attempt to challenge the Commission's order in a circuit court of appeals rather than in a district court enforcement proceeding are emphasized by the developments since the decision of the court below. Modification of the Commission's order to deny approval of the plan unless amended in respect of the requirement of a vote, and the filing by Commonwealth of amendments which include substantial changes in the treatment of security holders in its original proposals, would seem to make it clear that, absent further action in the administrative proceeding, there is no order susceptible of enforcement or review in any court. Even had the petition for review originally pre-

⁶ The concurring opinion represents a not too dissimilar approach to the same result.

sented a controversy within the jurisdiction of the circuit of appeals, these subsequent circumstances would, in our opinion, have rendered that controversy moot and made it appropriate to grant the petition for a writ of certiorari in order to remand the cause to the circuit court of appeals with instructions to dismiss the petition for review on grounds of mootness. *Montgomery Ward & Co. v. U. S.*, No. 408, October Term, 1945; *C. M. Patten & Co. v. U. S.*, 289 U. S. 705; *First Union Trust & Savings Bank v. Consumers Co.*, 290 U. S. 585; *Brownlow v. Schwartz*, 261 U. S. 216. We question the application of these cases to a petition for review properly dismissed below on the ground that it did not present a controversy cognizable in a circuit court of appeals. These subsequent events do, however, emphasize the correctness of the decision below and the propriety of denying certiorari.

1. The decision of the court below rests upon the circumstance that, before the Commission's order could either authorize or compel action, it was necessary that there be subsequent proceedings in a district court pursuant to Section 11 (e) in which that order would be subject to examination. It was therefore held that the order was not the kind of an order which Congress intended to be subject to the general provisions of Section 24 (a) of the Act permitting a direct review of Commission orders in a circuit court of appeals. That decision, of course, leaves open to objecting security holders the right to press their objec-

tions in the district court and, if those objections are not sustained, to appeal from an adverse order. Thus, the essential basis for the decision is that recourse to a circuit court of appeals at the then stage of the proceedings was premature and not in accordance with the statutory scheme. This ruling needs no extended examination, since the identical point was before this Court on petition for certiorari in *Okin v. Securities and Exchange Commission*, No. 1245, October Term, 1944. 

Section 11 (e) provides that in the event the Commission approves a plan filed thereunder, the Commission, at the request of the company involved, shall apply to a district court for an order approving and enforcing the plan. The district court must make such an order if it finds the plan fair and equitable and appropriate to effectuate the provisions of Section 11.

Not all Section 11 (e) plans require district court enforcement. Where the consummation of a plan can be accomplished through a stockholders' vote or generally through applicable provisions of state law, the Commission in the past has not required that a provision for district court enforcement be incorporated into the plan. The Commission has taken the position that there may be review in a circuit court of appeals under Section 24 of the Act of orders approving plans which are not predicated upon district court enforcement and are thus immediately operative to license the transactions proposed. Such a case

was *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, and so too were some of the other cases cited by petitioners (Pet. p. 12, 18).⁹

⁹ Petitioners' citations are not always apt. The case of *Todd v. Securities and Exchange Commission*, 137 F. 2d 475 (C. C. A. 6) (Pet. p. 12), involved an appeal from a Section 11 (b) (2) order. The case of *Otis & Co. v. Securities and Exchange Commission*, 323 U. S. 624 (Pet. p. 18) involved a Section 11 (e) plan which came up from a district court.

Petitioners apparently believe that the court below, in a ruling preliminary to the action reported as *Marquis & Co. v. Securities and Exchange Commission*, 134 F. 2d 822, took a position inconsistent with its decision in the instant case. Neither the majority judges nor the concurring judge in the court below thought this point worthy of discussion, although it was briefed before them. Actually the plan in that case did not originally provide for district court enforcement, and the proponents of the plan endeavored to consummate it by obtaining requisite votes under State law. Accordingly, the Commission did not challenge the jurisdiction of the Circuit Court of Appeals for the Third Circuit to entertain a petition for review filed therein by an aggrieved person, and the Commission certified the transcript of the record to that court. Subsequently, the companies involved decided that they could not execute the plan without judicial aid, and, at their request, the Commission instituted an enforcement proceeding in the District Court for the District of Delaware. The Commission then moved to stay the Circuit Court of Appeals proceeding pending action by the District Court. The motion was denied without opinion. At most the ruling was that once the exclusive jurisdiction of a circuit court of appeals attaches by virtue of the filing of the record, it cannot be displaced by the subsequent institution of an action in a District Court. The court below evidently did not regard its decision in the *Marquis* case as inconsistent with its holding in the instant case.

On the other hand, where a plan does contemplate district court enforcement, the statutory scheme renders inapplicable the general review provisions of Section 24 (a). For in such a case the function of the Commission and the function of the district court are "brigaded" and "intertwined"¹⁰ to the extent that the order of the Commission is no more than the first step in a combined agency-court proceeding, and hence no more than an interlocutory step in such joint proceeding. Cf. *Federal Power Commission v. Metropolitan Edison Company*, 304 U. S. 375. This was essentially the ruling of the Circuit Court of Appeals for the Second Circuit in *Okin v. Securities and Exchange Commission*, 145 F. 2d 206, dealing with Section 11 (e),¹¹ and of the Circuit Court of Appeals for the Seventh Circuit in *Gilbert v. Securities and Exchange Commission*, 146 F. 2d 513, where the cognate provisions of Section 11 (f) of the Act were involved.

It was also the holding of this Court in *Chicago & North Western Railway Co. v. United States*, 320 U. S. 718, affirming *Chicago & North Western Railway Co. v. United States*, 52 F. Supp. 65 (N. D. Ill.), where the general provision in the Urgent Deficiencies Act¹² for review of I. C. C.

¹⁰ *Palmer v. Massachusetts*, 308 U. S. 79, 87.

¹¹ The subsequent developments in this case are discussed at pp. 16-17, *infra*.

¹² Act of October 22, 1913, c. 32, 38 Stat. 208, 220, 28 U. S. C. § 47.

orders by a three-judge district court was declared inapplicable to an order of the I. C. C. approving a railroad reorganization plan under Section 77 of the Bankruptcy Act which was subject also to approval by a district court as provided in that section."

Petitioners see significance in the fact that in the *Okin* case this Court "vacated" the decision of the Circuit Court of Appeals for the Second Circuit. However, the order was vacated only because of error on another point that had no relation to the question here presented. The Commission's order in the *Okin* case had not only approved a Section 11 (e) plan by a subsidiary of Electric Bond and Share Company but had also approved an application by Bond and Share, which was not being reorganized, for permission to use, in a specified manner, the proceeds it was to receive under the plan. Complaint was made by Okin with reference both to the plan and the use of the funds. Upon motion of the Commission the Circuit Court of Appeals for the Second Circuit dismissed the petition for review in its entirety. In its brief in opposition to certiorari the Commission conceded that the portion of the order authorizing the use of the proceeds by the parent company was unrelated to the Section 11 (e) plan and was properly reviewable in a circuit

¹³ Further discussion of this point is contained in our brief in opposition to certiorari in the *Okin* case, No. 1245, October Term, 1944.

court of appeals under Section 24 (a).¹⁴ In its *per curiam* decision in the case, this Court stated:

The petition for writ of certiorari is granted limited to the question whether that part of the Commission's order which licensed Electric Bond and Share Company's use of the proceeds derived from the plan of reorganization, can be reviewed only under Section 24 (a) of the Public Utility Holding Company Act. The judgment is vacated and the cause is remanded to the Circuit Court of Appeals for consideration of that question.¹⁵

Under the circumstances, it is clear that this Court's action in no wise challenged the ruling of the Circuit Court of Appeals for the Second Circuit on the issue of the reviewability of the Section 11 (e) plan.

The case at bar raises no such additional problem as was involved in the *Okin* case. The Commission orders appealed from are concerned only with Commonwealth's Section 11 (e) plan, and not with any collateral matters. The only respects in which the cases differ are (1) that in the *Okin* case an enforcement proceeding had already

¹⁴ The Commission did not, however, concede that *Okin* was a "person aggrieved" within the meaning of that section. This was before the decision of the Court in *Securities and Exchange Commission v. Okin*, No. 815, October Term, 1944. See p. 18, *infra*.

¹⁵ The *per curiam* opinion of the Court also granted a petition for certiorari filed by the companies involved to correct a diminution of the record.

been instituted in a district court when the petition for review was filed in the Circuit Court of Appeals, and (2) that the reorganization plan in that case did not provide for a stockholders' vote prior to application to a district court for enforcement.¹⁰ In the language of the court below, these factual differences present "no difference in legal question which we can see" (R. 69).

Petitioners seem to rely principally (Pet. 11, 12, 16, 22) upon another Okin case, *Securities and Exchange Commission v. Okin*, No. 815, October Term, 1944. The only question in that case was whether a stockholder is a "person aggrieved" within the meaning of Section 24 (a) by a licensing order directed to his corporation and not affecting the rights of stockholders *inter sese*. The instant case does involve the rights of shareholders *inter sese*, and the Commission has always conceded the petitioners' right to be heard in an appropriate court. The question here deals only with the court in which they shall exercise their unquestioned right to be heard.

2. It is the essence of the Commission's position that the preliminary and interlocutory character of its original order approving the plan rendered the general provisions of Section 24 (a) for review in a circuit court of appeals inapplicable. The

¹⁰ This second point of difference has been eliminated by the subsequent decision of the Commission that the provision for a stockholders' vote should be deleted from the plan. See pp. 7-10, *supra*.

subsequent events emphasize the preliminary character of the Commission's order with respect to its impact on security holders such as petitioners. By its order of November 1, 1945, amending the earlier order approving the plan, the Commission conditioned its prior approval of the plan on the submission by Commonwealth of an amendment to the plan deleting the provision for a stockholders' vote. Commonwealth submitted an amendment deleting the provision for a vote but made the amendment contingent upon acceptance by the Commission of certain other amendments which import substantial changes into the plan (see pp. 9-10, *supra*). If Commonwealth's proposals are accepted, the plan constituting the basis for the petition for review will have been substantially changed. If Commonwealth's proposals are not accepted, there will then be no plan approved by the Commission and the prospect is one of continued administrative developments and the consideration of further plans either under Section 11 (e) or Section 11 (d). In either case the subsequent events put in bold relief the interlocutory character of the orders appealed from and the essential prematurity of the petition for review in a circuit court of appeals.

3. It is submitted that the motion to defer should be denied. The subsequent events relied upon by petitioners as the basis for deferring action only emphasize the preliminary nature of the Commission's order under review, the cor-

rectness of the decision of the court below not to entertain the petition for review, and the lack of substance in the petition for certiorari. Moreover, there is danger that the very pendency of the petition for certiorari, undisposed of by this Court, may cause some of the undesirable procedural consequences which would have followed from a holding that petitioners were entitled to have the court below rule on their objections to the plan. Thus, the thrust of petitioners' procedural contentions is directed to avoiding consideration of a plan in a district court until the cause has first gone through the appellate courts. If, contrary to the ruling of the court below, this were the appropriate statutory procedure applicable to the orders under review, it would nevertheless be true that affirmance of the Commission's order would not be conclusive of all issues which might arise in the district court enforcement proceeding,¹⁷ and the procedures required by such a construction of the statute would be at best dilatory. In that event it would be vital to the orderly administration of the statute that there be no unusual time lag at any one of the many procedural stages involved. On the other hand, if, as we believe to be the case,

¹⁷ It is possible, for example, that preferred stockholders or other persons not parties to the proceeding in the circuit court of appeals may raise issues in the district court which were not raised by the petitioners in the circuit court of appeals, and that another series of appellate proceedings would follow before final disposition of the plan.

the decision below is correct and the petition for a writ of certiorari without merit, it is submitted that the proceeding in this Court should not be permitted to remain pending, since even without a stay its very pendency might serve as an excuse for a delay of an appropriate enforcement proceeding in a district court.

CONCLUSION

For the reasons stated, the motion to defer should be denied. The petition for a writ of certiorari should be denied unless the Court should deem applicable the considerations which lead to the vacation of a decision of a court below which has subsequently become moot, in which event the petition should be granted and the cause remanded to the Circuit Court of Appeals with instructions to dismiss the petition for review on the ground of mootness.

Respectfully submitted.

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